IN THE

Supreme Court of the United States.

No. 1108.

LAURA E. FRENCH,

PLAINTIFF IN ERROR,

vs.

MOSES HOPKINS and JAMES MEE,

DEFENDANTS IN ERROR.

Brief of Defendants in Error on Motion to Dismiss.

WM. M. STEWART,
Counsel for Defendants in Error.

In the Supreme Court of the United States.

LAURA E. FRENCH,
PLAINTIFF IN ERROR,
v.
MOSES HOPKINS AND JAMES MEE,
DEFENDANTS IN ERROR.

No. 1,108.

Brief of Defendants in Error on Motion to Dismiss.

The facts in the case are as follows:

The defendant in error, Moses Hopkins, obtained a judgment foreclosing a mortgage in the superior court of Alameda county, State of California. By the terms of said judgment the mortgaged premises was ordered to be sold by the sheriff of the county in one parcel, and the attorney for the defendant, E. Wiard, consented to the judgment in that form. The sheriff sold said land to the defendant in error, James Mee, in one parcel, as directed by said judgment. Laura E. French, the plaintiff in error, and a judgment creditor of the mortgagor, made a motion in said superior court to set aside said sheriff's sale, on the ground that said sale was made of the mortgaged premises in one parcel, and not in separate parcels, and said court made an order setting aside the same.

Each of the defendants in error herein separately appealed

to the supreme court of the State from said order. Said supreme court, upon the hearing of said appeals, reversed the order of the lower court, from which decision the writ of error herein was sued out, and by order of the Chief Justice of the State supreme court said two cases were consolidated, being identical in every particular except the change of names.

The foregoing facts appear in the printed record hereto attached and entitled "Appendix," and are all the facts having reference to the question of jurisdiction.

The error complained of is the provision in the judgment of the lower court ordering the mortgaged premises sold in one parcel.

No attempt was made to vacate or set aside that judgment either by motion for new trial, appeal, or otherwise. All that was done was the motion to set aside the sale on the ground that the premises was sold in one parcel. The action of the court in setting aside the sale was the only matter brought before the supreme court of the State. The court below granted the motion and ordered the sale set aside, which order was reversed by the supreme court of the State, as we have already seen.

The State supreme court held that it was in the discretion of the lower court to order mortgaged premises sold in separate parts or in a single parcel, and that the judgment ordering a sale in a single parcel was a valid subsisting judgment, which the sheriff was compelled to execute according to its express terms.

The only question involved in the decision of the supreme court was whether or not the judgment of the court below was absolutely void so as to vitiate the sale made in pursuance thereof.

The error complained of, as appears from the petition for the writ of error, consists in the provision in the judgment

of foreclosure directing the mortgaged premises to be sold in one parcel. It is claimed by plaintiff in error that this part of the judgment is in violation of section 10 of Article 1 of the Constitution of the United States, and is also in violation of section 1 of the Fourteenth Amendment, and it is so claimed because it is said that said judgment violates the obligation of contracts and denies to the plaintiff in error the equal protection of the law.

It is not pretended that the validity of any treaty or statute of, or authority exercised under, the United States was called in question and that the decision was against such validity; nor is it claimed that the validity of any statute of, or authority exercised under, any State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States was drawn in question, and that the decision was in favor of such validity.

But the plaintiff in error seems to contend that the provisions in the Constitution of the United States referred to in his petition require the State court to decide all questions affecting him according to absolute justice, as he understands it, notwithstanding the matter is of exclusive State jurisdiction. He appears to claim that he has some right, title, privilege, or immunity under section 10 of Article 1 of the Constitution of the United States, or under the Fourteenth Amendment, which exonerates him from the inconvenience of an adverse decision in the courts of his State, and he seems also to think that it is unnecessary for him to call to the attention of the State court the fact that he claims such right, title, privilege, or immunity under the Constitution of the United States, but delays the assertion of such claim until his case is brought before this honorable court.

The position of the plaintiff in error is well illustrated by the language of this court in *Railroad Company* v. *Rock* (4 Wall., 177), wherein the court said:

"The whole case, in the language of the brief, is put upon the ground that the 'supreme court of Iowa has made a decision in this case which impairs the obligation of contracts;' and the argument goes upon the fundamental error that this court can, as an appellate tribunal, reverse the decision of a State court, because that court may hold a contract to be void which this court might not hold to be valid. If this were the law, every case of a contract held by the State court not to be binding, for any cause whatever, can be brought to this court for review, and we should thus become the court of final resort in all cases of contracts where the decisions of State courts were against the validity of the contracts set up in those courts.

"This, obviously, was not the purpose of the judiciary act."

Besides, the judgment of foreclosure rendered by the lower court was not before the supreme court of the State for review, and is not here for examination on this writ of error. The only matter for review here is the judgment of the supreme court reversing the order of the court below setting aside the sheriff's sale. This sale is admitted to have been in strict pursuance of the judgment of the court below, which judgment remains in full force and was satisfactory to the attorney for the defendant in the foreclosure proceedings.

Argument is unnecessary to show that the decision of the supreme court of the State, refusing to set aside a sale of mortgaged premises made in strict conformity to an existing valid judgment, can by no possibility involve a Federal question. The suggestion of such a question for the first time in this court indicates not only that the idea was an afterthought, but, also, that the writ of error was sued out for delay.

For a full explanation of the statute of California in regard to the sale of mortgaged premises, and the reasons for

the judgment of the supreme court of the State reversing the order setting aside the sale, we call particular attention to the opinion of that court on pages 29–32 of this brief.

We respectfully submit that the writ of error should be dismissed.

WM. M. STEWART,
Counsel for Defendants in Error.

APPENDIX.

The following is a copy of the record on writ of error to the Supreme Court of the United States so far as the same relates to the question of jurisdiction, and consists—

1. Of the original bill of exceptions on appeal from the superior court of Alameda county to the supreme court of California, except certain affidavits in support of the motion to set aside the sheriff's sale of the mortgaged premises (which is the subject of controversy herein), and are immaterial for the purposes of the motion to dismiss the writ of error.

2. Opinion of the supreme court of California, reversing the order setting aside the sheriff's sale.

3. Petition for writ of error.

4. Order of Chief-Justice supreme court of California, consolidating the two cases involving the question under consideration on the motion to dismiss writ of error.

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF ALAMEDA.

MOSES HOPKINS, Plaintiff, *v.* EDWARD WIARD *et al.* (T. L. Barker, Executor, &c., substituted as Defendant for Edward Wiard, deceased), Defendants.	*No.* 3414.

ORDER SETTING ASIDE SALE BY SHERIFF.

Extract from the Minutes of the Superior Court of the State of California in and for the County of Alameda.

FRIDAY, *July* 16, 1886.

At a session of this court held this day—present, Hon. W. E. Greene, judge, and W. M. Gilcrest, deputy clerk—the following proceedings were had:

MOSES HOPKINS
v.
T. L. BARKER, Executor, &c., *et al.* } *No.* 3414.

The motion heretofore made on behalf of the defendant, Laura E. French, to set aside the sale made by the sheriff of this county of the property described in the decree herein, having been argued and submitted to the court for its decision, and the court, having fully considered the same, orders that the said motion be, and the same is hereby, granted; to which order the plaintiff, by his attorney, then and there excepted; and to which order James Mee, the purchaser at said sale, being present in court, by his attorney, Joseph Mee, Esq., then and there also accepted.

BILL OF EXCEPTIONS.

[Title of court and cause.]

Be it known and remembered that heretofore, to wit, July 28, A. D. 1885, Moses Hopkins, the above-named plaintiff, filed his complaint in the superior court of the State of California in and for the county of Alameda against Edward Wiard; George M. Palmer, as administrator of the estate of Mary J. Wiard, deceased; Laura E. French and John Doe French; of which complaint the following is a copy:

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF ALAMEDA.

MOSES HOPKINS, Plaintiff,
v.
EDWARD WIARD; GEORGE M. PALMER, as Administrator of the Estate of Mary J. Wiard, deceased; LAURA E. FRENCH, JOHN DOE FRENCH, Defendants. } *No.* 3414.

Moses Hopkins, the above-named plaintiff, complains of Edward Wiard; George M. Palmer, as administrator of the

estate of Mary J. Wiard, deceased; Laura E. French, John Doe French, the above-named defendants, and alleges:

I. That heretofore, viz., March 2, A. D. 1883, the defendant, Edward Wiard, made and executed to this plaintiff his certain promissory note in writing for the sum of seventy thousand dollars, payable one year thereafter, with interest at the rate of nine per cent. per annum, of which said promissory note the following is a copy:

$70,000. SAN FRANCISCO, *March* 2, 1883.

One year after date, without grace, for value received, in gold coin of the United States, I promise to pay to Moses Hopkins, or order, the sum of seventy thousand ($70,000) dollars in gold coin of the United States of the standard issued from the Mint of the United States during the year 1867, with interest thereon from date until paid at the rate of nine-twelfths of one per cent. per month; said interest payable in United States gold coin of the same standard, monthly, in advance, and if not paid as it becomes due, is to be added to the principal sum and become a part thereof, and thereafter is to bear interest at the same rate; and in case said monthly interest or any part thereof is not paid within ten days after the same becomes due and payable, then the whole of said principal sum and interest shall forthwith become due and payable at the election of the holder of this note, and shall bear interest from the date of said election until paid, at the rate of one and one-half of one per cent. per month. This note is secured by a mortgage bearing even date herewith.

EDWARD WIARD.

II. That at the same time with the execution of the said promissory note, and as part of the same transaction, the said defendant and one Mary J. Wiard (since deceased), in order to secure the payment of the said promissory note, and of the money and interest therein promised and agreed to be paid, made, executed, and delivered to this plaintiff a certain indenture of mortgage, by which they granted, bargained, and sold unto this plaintiff all those certain pieces, parcels, tracts, and lots of land, situate, lying, and being in the county of Alameda, State of California, at the embar-

cadero of Temescal, in the Bay of San Francisco, and particularly bounded and described as follows, viz:

I. Commencing at a stake or post near where the old slaughter-house stood; said stake or post bears from the northeasterly corner of the house formerly occupied by Louis G. Bruguiere, north 36° west, and is 32 rods distant therefrom; thence running from said stake north 85½° east 12 chains 46 links, crossing the road to a stake marked 'Bruguiere,' and thence north 78¾° east 14 chains 65 links along the road to a stake marked 'Bruguiere;' thence south 28¼° east 28 chains 61 links, crossing a creek or slough, and to a stake marked 'Bruguiere;' thence along a fence and south 78⅛° west, and through a willow grove 39 chains and 41 links to a stake on the beach of the Bay of San Francisco aforesaid, marked 'Bruguiere,' and thence along the shore of said bay north 41½° west 30 chains 97 links, and to the place of beginning—containing 95 48-100 acres, more or less, and being the same land described in a deed of L. G. Bruguiere to John McHenry, dated January 29, 1855, and recorded in the office of the recorder of Alameda county, in Liber E of Deeds, at page 532, and the same tract of land which is designated as No. 7 on a certain map of the rancho of Vincente and Domingo Peralta, as surveyed by Julius Kellersberger, now on file in said recorder's office of Alameda county. And also—

2. That certain other tract of land in the county aforesaid and adjoining on the south the piece above described, bounded and described as follows, viz:

Commencing at a stake marked 'H,' at high water on the Bay of San Francisco, on the south side of the willows of Temescal, and at the northwest corner of land formerly owned by John A. Hobart, being Plot No. 6 on said map, and running thence along the northerly line of said Plot No. 6 and north 72¼° west 34.40 chains to a post in the northern fence of said Hobart's lot, being No. 6 on said map, and thence north 28¼° east 3 chains, and to the southeast corner of lot No. 7 above described, and thence running westerly and along the most southerly line of Plot No. 7 aforesaid, unto the Bay of San Francisco aforesaid; and thence running southerly along the Bay of San Francisco to the point

of beginning—containing 14 41-100 acres, more or less, and being the same plot of land known and marked as No. 39 on the map aforesaid. And also—

3. That other tract of land in the county aforesaid, adjoining on the north the Plot No. 7 first above described, and lying between said Plot No. 7 on the south and southwest, and the southerly line of Plot No. 41, as the same is marked on said map, on the north, and the Bay of San Francisco on the west, being a piece of land nearly triangular in shape, and containing 4 81-100 acres, more or less.

All said three tracts of land hereinbefore described and bounded comprising one tract, and the same one hundred and fifteen acres, more or less, which was conveyed by John McHenry and Ellen McHenry, his wife, to William Y. Patch, by deed recorded in the county recorder's office of the county of Alameda, in Liber G of Deeds, at pages 700 and 701.

Together with, all and singular, the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining.

Which said indenture of mortgage was thereafter, viz., March 6, 1883, recorded in the office of the county recorder, in and for the said county of Alameda, in Liber 200 of Mortgages, at page 128 *et seq.*

III. That default has been made in the payment of the said promissory note; and that no part of the principal sum named therein has been paid (with the exception of the sum of two thousand dollars, which was paid on account of said principal sum on the 2d day of July, A. D. 1883), nor any of the interest that has grown due thereon since the 2d day of March, 1884, and that there is now unpaid of the principal sum named in said note, the sum of sixty-eight thousand dollars in gold coin, with interest thereon from the 2d day of March, 1884, at the rate of nine-twelfths of one per cent. per month, compounding monthly.

IV. That in and by the said indenture of mortgage the said mortgagors covenanted and agreed, to and with the said plaintiff, that upon the filing of a complaint in any court of competent jurisdiction, for the foreclosure of the said mortgage, they would pay to the plaintiff in the said action, as

and for counsel fees for instituting the said action, the sum of one hundred dollars, and also a sum of money equal to ten per cent. upon the amount that might be found to be due upon the said promissory note, and that the same should be secured by the aforesaid indenture of mortgage, and be a lien upon the lands described therein.

That no part of the said counsel fee has been paid.

V. That since the making of the said indenture of mortgage, the said Mary J. Wiard has died intestate, and that such proceedings have been had in this court, in the matter of the estate of said Mary J. Wiard, deceased; that by an order of said court, therein duly given and made, the defendant, George M. Palmer, has been appointed the administrator of her estate, and that letters of administration upon said estate have been issued to him, and he is still acting as such administrator.

VI. That the said George M. Palmer, as administrator of the estate of said Mary J. Wiard, deceased, and the defendants, Laura E. French, John Doe French, have or claim to have some interest, claim, or estate in or to the said mortgaged premises, but that the claim, interest, or estate of the said defendants, and of each of them, if any they have, was created subsequent to the execution and recording of the aforesaid indenture of mortgage, and is subject and subordinate to the aforesaid lien of plaintiff.

That, as this plaintiff is informed and believes, the said Laura E. French is a married woman, and the defendant John Doe French is her husband. That plaintiff does not know the full and true name of the said John Doe French, and he asks that, when ascertained, his full name may be inserted herein.

Wherefore, this plaintiff prays the judgment of this court:

1st. That there is due and owing to this plaintiff upon the aforesaid promissory note the sum of sixty-eight thousand dollars in gold coin, together with interest thereon from the 2d day of March, 1883, at the rate of nine-twelfths of one per cent. per month, compounding monthly, and also the sum of one hundred dollars, and a sum of money equal to ten per cent. upon the amount found due upon the said promissory note as and for counsel fees for the institution of this suit.

2d. That the said sum of money may be declared to be a lien upon the aforesaid lands and premises, and secured by the aforesaid indenture of mortgage.

3d. That the said lands and premises be sold by the sheriff of Alameda county, in the manner prescribed by law, for the sale of real property under execution, and that out of the proceeds of said sale the said sheriff pay to this plaintiff the costs incurred by him herein, and also the amounts found due and owing to him as aforesaid.

4th. That if the proceeds of said sale are insufficient to make the said payments, and it shall appear from the sheriff's return that a deficiency exists, judgment may then be docketed for such deficiency against the defendant Edward Wiard, and that the plaintiff may have execution against him for the amount of the judgment so docketed.

5th. That the defendants herein, and each of them, and all persons claiming, or to claim under them, or either of them, may be forever barred and foreclosed of all right, title, claim or equity of redemption in or to the aforesaid lands and premises and every part thereof.

6th. That this plaintiff may have such other and further relief as in the premises may be just and in accordance to the principles of equity.

JARBOE, HARRISON & GOODFELLOW,
Attorneys for Plaintiff.

STATE OF CALIFORNIA,
City and County of San Francisco, } *ss.*

Moses Hopkins, having been duly sworn, says on oath as follows: I am the plaintiff in the above-entitled action. I have read the foregoing complaint, and well know its contents. The same is true of my own knowledge, except as to the matters which are therein stated on my information or belief, and as to those matters I believe it to be true.

MOSES HOPKINS.

Subscribed and sworn to before me this 27th day of July, 1885.

[NOTARIAL SEAL.]

E. H. THARP,
Notary Public."

That on the said 28th day of July, 1885, a summons was issued upon said complaint under the seal of said court, directed to said defendants and signed by the clerk, of which the following is a copy:

"[Title of Court and Cause].

The people of the State of California send greeting to Edward Wiard, Geo. M. Palmer, as Administrator of the estate of Mary J. Wiard, deceased, Laura E. French, John Doe French, Defendants.

You are hereby required to appear in an action brought against you by the above-named plaintiff, in the superior court of the State of California, in and for the county of Alameda, and to answer the complaint filed therein within ten days (exclusive of the day of service) after the service on you of this summons—if served within this county, or, if served elsewhere, within thirty days—or judgment by default will be taken against you according to the prayer of said complaint.

The said action is brought to obtain a decree of this court:

1st. That there is due and owing to the plaintiff upon a certain promissory note bearing date March 2d, 1883, executed by the defendant Wiard to the plaintiff, and set forth in the complaint, the sum of $68,000 in gold coin, together with interest thereon from March 2d, 1884, at the rate of nine-twelfths of one per cent. per month, compounding monthly.

And also the further sum of $100 in gold coin, together with a sum of money in gold coin equal to ten per cent. upon the amount due on said promissory note for counsel fees for instituting this suit.

2d. That the amounts so found to be due and owing to said plaintiff may be declared to be a lien upon certain lands and premises described in a certain indenture of mortgage, bearing date March 2d, 1883, and executed by the said defendants, Edward Wiard and Mary J. Wiard (since deceased) to the plaintiff, to secure the same, and which lands and premises are also described in the complaint; and that the said lands and premises may be sold and the proceeds applied to the payment of said amounts so found to be due and

owing to the plaintiff as aforesaid, together with expenses of sale and costs of suit, and, in case such proceeds are not sufficient to pay the same, then to obtain an execution against said defendant, Edward Wiard, for the balance remaining due, and also that the defendants and all persons claiming by, through, or under them, may be barred, and foreclosed of all right, title, claim, lien, equity of redemption and interest in and to said mortgaged premises; and for other and further relief.

And you are hereby notified that if you fail to appear and answer said complaint as above required, the said plaintiff will apply to the court for the relief demanded in the said complaint.

Given under my hand and seal of the superior court of the State of California, in and for the county of Alameda, this 28th day of July, in the year of our Lord one thousand eight hundred and eighty-five.

CHARLES T. BOARDMAN,
Clerk,

[Seal of Superior Court.] By W. R. THOMAS,
Deputy Clerk."

Which said summons was afterwards, to wit, on the 7th day of August, 1885, served upon the defendants, Edward Wiard and George M. Palmer, as administrator of the estate of Mary J. Wiard, deceased, and on the 16th day of September, A. D. 1885, was served upon the defendant Laura E. French.

That on the 29th day of September, A. D. 1885, the said Laura E. French filed her answer to the said complaint, of which said answer the following is a copy.

"[Title of Court and Cause].

Now comes the defendant Laura E. French, and for her separate answer to plaintiff's complaint filed herein, admits, upon her information and belief, each and every allegation in said complaint contained; and said defendant Laura E. French, seeking affirmative relief against her said co-defendants, Edward Wiard and George M. Palmer, affecting the property mentioned and described in the above entitled action, and to which the same relates, in addition to her said answer to said complaint hereinbefore set forth, at the same

time therewith, makes and files this, her cross-complaint herein, against said defendants, Edward Wiard and George M. Palmer, and for cause of such cross-complaint avers.

That heretofore, to wit, on the 18th day of August, 1885, she recovered judgment for money loaned, against said defendant, Edward Wiard, in the superior court of Alameda county, State of California, for the sum of eight thousand five hundred and eight dollars and sixty cents ($8,508.60) and costs of suit, taxes at forty-eight dollars and ninety cents ($48.90), with interest thereon at the rate of seven per cent. per annum.

That thereafter and on, to wit, said 18th day of August, said judgment was duly entered and recorded in judgment book of said court, vol. 4, p. 466, and thereafter, to wit, then and there, duly entered and docketed by the clerk of said court upon the docket of said court, kept by the said clerk as required by law.

That demand has been made by the sheriff of said Alameda county on execution duly issued on said judgment for the payment thereof; that no part of the same or of the interest due thereon has been paid, except the sum of five hundred dollars ($500) paid by said Edward Wiard on, to wit, September 8, 1885, and the entire balance and remainder of said judgment remains and is due and wholly unpaid, and a lien upon the lands and premises mentioned and described in plaintiff's complaint, subject only to plaintiff's lien under said mortgage, as in said complaint alleged.

That the said George M. Palmer, one of the defendants herein, asserts some claim or interest in the lands and premises, the precise character or value of which is unknown to this cross-complainant; but she alleges that the said lien or interest of the said Palmer, if any exists, is subject and subordinate to this cross-complainant's lien and interest under her said judgment, as hereinbefore set forth and referred to.

Wherefore, this cross-complainant unites in the prayer of said plaintiff in this action and prays with the plaintiff that the same may be granted in so far that the usual decree may be made for the sale of the land and premises mentioned and described in said complaint by the sheriff of the

county in which the same are situated, and for the application of the net proceeds of such sale to the payment of said amount so due to said plaintiff, in so far as the same may be necessary, and that said sale of said lands and premises so to be made by said sheriff, may be made for the benefit of this defendant and cross-complainant, as well as for said plaintiff.

And this defendant and cross-complainant further prays that after all the amounts respectively due said plaintiff shall have been paid and discharged out of the proceeds of said sale, made under said decree of foreclosure, that the balance of the money arising from such sale (if any), or so much thereof as may be necessary, be applied to the payment of her said judgment against said defendant Edward Wiard, as hereinbefore set forth, or in part payment thereof in case said balance should not be sufficient to pay and discharge the same in full.

And for such further relief in the premises as to this court shall seem equitable and proper, and for costs of suit.

C. M. JENNINGS,
Attorney for Defendant, &c., Laura E. French.

STATE OF CALIFORNIA, }
City and County of San Francisco, } ss:

Laura E. French, being first duly sworn, deposes and says on oath, that she is one of the defendants in the above entitled action; that she has read the foregoing answer and cross-complaint and knows the contents thereof, and that the same is true of her own knowledge, except as to the matters or things therein stated on information or belief, and as to those things she believes it to be true.

LAURA E. FRENCH.

Subscribed and sworn to before me, this 25th day of September, A.D. 1885.

[NOTARIAL SEAL.] HOLLAND SMITH,
Notary Public."

That on the 9th day of October, A.D. 1885, J. W. French, the defendant, sued by the name of John Doe French, filed his answer to the said complaint, of which answer the following is a copy:

"[Title of Court and Cause.]

Now comes J. W. French, one of the defendants in the above entitled cause, who is sued by and under the fictitious name of John Doe French, by C. M. Jennings, his attorney, and

I.

Admits that he is the husband of Laura E. French, one of the defendants herein, and

II.

Further answering, he disclaims all interest, share or estate in or to the lands and premises mentioned and described in plaintiff's complaint, or any part thereof, except such interest, share, or estate, as he may have as the husband of said Laura E. French.

J. W. FRENCH.
By C. M. JENNINGS,
his Attorney."

That the defendants, Edward Wiard and George M. Palmer, as administrator of the estate of Mary J. Wiard, deceased, did not appear or answer the said complaint, and the time allowed by law for so appearing having expired, their and each of their defaults for failure to appear or answer the said complaint were duly entered by the clerk of said court, at the request of plaintiff's attorneys.

That thereafter, to wit, on the 23d day of November, 1885, the said cause was tried and the said court rendered a decree of foreclosure in said action in the words and figures following:

"*In the Superior Court of the State of California, in and for the County of Alameda.*

MOSES HOPKINS
v.
EDWARD WIARD, GEORGE M. PALMER, as Administrator of the Estate of Mary J. Wiard, deceased; Laura E. French, John Doe French.

This cause was brought on for hearing upon the complaint taken as confessed by all the defendants, and upon the cross-

complaint of the defendant Laura E. French, taken as confessed by the other defendants, and it having been shown to the satisfaction of the court that the defendants have been regularly served with the summons issued upon the complaint herein, and that the defendants, Edward Wiard and George M. Palmer, as administrator of the estate of Mary J. Wiard, deceased, have not either of them answered the said complaint or in any way appeared herein, and that the defaults of each of the said named defendants have been regularly entered herein by the clerk of this court, and that the defendant Laura E. French has answered the said complaint, and in her said answer has admitted each and every allegation in the said complaint, and has in her said answer set forth her claim by way of lien upon the property described in the complaint, subject an subordinate to the lien of the plaintiff, and that the defendant J. W. French, sued herein as John Doe French, has filed an answer to the complaint herein, disclaiming all claim, interest or lien in or to the property described in said complaint.

The court thereupon proceeded to the hearing of the said complaint, and the plaintiff having offered and used in evidence the promissory note and mortgage alleged in the complaint, and it appearing therefrom and from the testimony of witnesses in reference thereto that there is at this date unpaid upon the said promissory note the sum of seventy-nine thousand three hundred and seventy-four 91-100 ($79,374.91) dollars in gold coin of the United States, and also that the plaintiff is entitled to recover in this action as and for counsel fees, under the provisions and terms of the said mortgage, the sum of twenty-five hundred dollars, which said sum is hereby fixed by the court as a reasonable fee to be allowed to the plaintiff herein, making in the aggregate eighty-one thousand eight hundred and seventy-four 91-100 ($81,874.91) dollars, and that the same is secured to be paid by the mortgage alleged in the complaint, and is a lien upon the lands and premises hereinafter described.

And it having been further shown to the satisfaction of the court that the cross-complaint of the defendant Laura E. French has been regularly served upon the defendants, Edward Wiard and George M. Palmer, and that the time

allowed by law for the said defendants to answer the same had expired, and that the said defendants had not either of them answered the said cross-complaint, their defaults for not answering the same were thereupon entered by order of court, and proof was thereupon made on behalf of said Laura E. French, to the satisfaction of the court, that there is at this date unpaid upon the judgment set forth in said cross-complaint, and owing from the said Edward Wiard to the said Laura E. French, the sum of seven thousand nine hundred and sixty-seven 20-100 ($7,967\frac{20}{100}$) dollars, and that the same is a lien upon the aforesaid lands and premises, subject and subordinate to the aforesaid lien thereon of the plaintiff herein;

It is now, upon motion of Messrs. Jarboe, Harrison & Goodfellow, attorneys for the plaintiff herein, ordered, adjudged, and decreed that Moses Hopkins, the plaintiff herein, do have and recover from Edward Wiard, one of the defendants herein, the sum of eighty-one thousand eight hundred and seventy-four 91-100 ($81,874\frac{91}{100}$) dollars in gold coin, together with his costs incurred herein, which are hereby taxed at the sum of $21.15, together with interest thereon from this date at the rate of seven per cent. per annum, and that the same be and is hereby declared to be a lien upon the lands and premises hereinafter described.

And it is by the court further ordered, adjudged, and decreed, that the said lands and premises be sold by the sheriff of the county of Alameda, in the manner prescribed by law for the sale of real property under execution, and that the said lands and premises be sold as a whole and in one parcel, and that out of the proceeds of said sale, said sheriff, after deducting therefrom his fees and the expenses of said sale, pay to the plaintiff herein, or his attorneys, his costs aforesaid, amounting to the sum of twenty-one 15-100 dollars, and also the aforesaid sum of eighty-one thousand eight hundred and seventy-four 91-100 dollars, with interest thereon from this date until the day of said sale, at the rate of seven per cent. per annum, and that after making the aforesaid payments he then pay out of the surplus funds of said sale, if any there be then remaining in his hands, to the defendant, Laura E. French, or her attorney, the sum

of seven thousand nine hundred and sixty-seven 20-100 ($7,967\frac{1}{100}$) dollars, with interest thereon from this date at at the rate of seven per cent. per annum until the day of said sale, and that after making the aforesaid payments, the said sheriff bring the remainder of the surplus proceeds of said sale, if any there be, together with the return of his proceedings, in making said sale and payments, into this court, there to remain until the further order of this court in reference thereto.

And it is by the court further ordered, adjudged, and decreed that if the proceeds of said sale are insufficient to make the aforesaid payments, and it shall appear from the sheriff's return that a deficiency exists in the amount found due herein to the plaintiff, judgment for such deficiency shall then be docketed against the defendant Edward Wiard, and that the plaintiff may have execution therefor.

It is by the court further ordered, adjudged, and decreed that at the aforesaid sale by the sheriff, any of the parties hereto may become the purchaser, and that upon the execution of a deed of conveyance by the sheriff to the purchaser of the said lands and premises, and the demand by or on behalf of the said purchaser to be let into possession thereof, he be, by the defendants and all persons claiming under them, let into the possession thereof, and in case of a refusal so to let the purchaser into the possession thereof, a writ of assistance issue, without any further notice, requiring the sheriff to place and maintain the said purchaser in the quiet and peaceable possession of the lands and premises described in the said sheriff's deed of conveyance.

And it is by the court further ordered, adjudged, and decreed that upon the execution by the sheriff to the said purchaser of a deed of conveyance of the said lands and premises, the defendants herein, Edward Wiard, George M. Palmer, as administrator of the estate of Mary J. Wiard, deceased, Laura E. French, and J. W. French, sued herein as John Doe French, and all persons claiming or to claim under, by or through the said defendants, or either of them, subsequent to the commencement of this action, be, and they are hereby barred and foreclosed of all right, title, estate, claim, and equity of redemption in and to the said lands and premises, and every part thereof.

The lands and premises hereinbefore referred to, and which are hereby directed to be sold by the sheriff aforesaid, are the following, viz:

All those certain lands situate, lying and being in the county of Alameda, State of California, bounded and described as follows, to wit:

Commencing at a stake marked 'H,' at high water-mark of the Bay of San Francisco, on the south side of the willows of Temescal, at the northwest corner of land formerly owned by John A. Hobart, being plot No. six (6), on a certain map of the Rancho of Vincente and Domingo Peralta, as surveyed by Julius Kellersberger, now on file in the recorder's office of Alameda county; and running thence along the northerly line of said Plot No. 6, north 72¼° east 34.40 chains to a post in the northern fence of said Hobart's lot, said post being the southeasterly corner of Plot No. 39, on said map; thence north 28¼° west 31.61 chains along the easterly line of Plots 39 and 7 of said map to the northeast corner of Plot No. 7; thence south 78¾° west 1 chain; thence north 13° west 2.68 chains to the south line of Plot No. 41, on said map; thence along the south line of said Plot No. 41 south 75½° west 26.05 chains to a stake or post on the beach near where the old slaughter-house formerly stood; said stake or post bears from the northeasterly corner of the house formerly occupied by Louis G. Bruguiere, north 36° west, and is 32 rods distant therefrom; said stake is also the northwesterly corner of Plot No. 7, on said map; thence in a southeasterly direction along the shore of the Bay of San Francisco 30.97 chains to a stake at the southwesterly corner of said Plot No. 7; thence south 62° east 7.50 chains to the place of beginning; containing 115 acres, more or less, and being the same three tracts conveyed by John McHenry and Ellen McHenry, his wife, to William Y. Patch, by deed recorded in the county recorder's office of Alameda county, in Liber G of Deeds, pages 700 and 701.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining.

Dated at Oakland, county of Alameda, the 23d day of November, A. D. 1885.

W. E. GREENE,
Judge of Superior Court."

Which said judgment was thereafter, to wit, on the 30th day of November, 1885, entered of record in said court, in Judgment Book 4, at page 534, *et seq.*

That thereafter, to wit, on the 26th day of December, 1885, the plaintiff caused to be issued to the sheriff of the county of Alameda an order of sale upon said judgment in the words and figures following, to wit:

"[Title of Court and Cause.]

The People of the State of California to the Sheriff of the County of Alameda, Greeting:

Whereas, on the 23d day of November, A. D. 1885, Moses Hopkins, plaintiff, obtained a judgment and decree in superior court in and for the county of Alameda, State of California, against Edward Wiard, George M. Palmer, as administrator of the estate of Mary J. Wiard, deceased; Laura E. French and John Doe French, defendants, in an action wherein the said Moses Hopkins was plaintiff, and the said Edward Wiard and the said other defendants were defendants, which judgment and decree was on the 30th day of November, A. D. 1885, recorded in Judgment Book IV of said court, at page 534, &c., and the roll filed and judgment and decree docketed in the clerk's office thereof, a certified copy of which said judgment and decree is hereto annexed and made part hereof, and in and by which judgment and decree, it is ordered, adjudged and decreed that the lands and premises mentioned and described in the said decree be sold according to law.

Now therefore, you, the said sheriff, are hereby commanded and required to proceed to notice for sale and to sell the premises described in said judgment and decree, and apply the proceeds of said sale as in said judgment and decree directed, and to make and file your report of such sale with the clerk of this court within sixty days from the date of your receipt hereof, and to do all things according to the terms and requirements of said judgment and decree, and the provisions of the statute in such case made and provided.

In witness whereof, I hereunto set my hand and affixed the seal of said superior court, at my office, in the city of Oakland, county of Alameda, this 26th day of December, A. D. 1885.

CHAS. T. BOARDMAN,
Clerk.

[Seal of Superior Court.] By GUY C. EARL,
Deputy Clerk.

To which order of sale was attached a certified copy of the aforesaid judgment; and that thereafter, to wit, on the 25th day of January, A. D., 1886, the said sheriff, under the order of sale so issued to him, sold the property described in said judgment to James Mee, and on the 27th day of January, A. D. 1886, made his return of sale, indorsed upon said order of sale, in the words and figures following, to wit:

"SHERIFF'S OFFICE } No. 3414.
Of the County of Alameda. }

SHERIFF'S RETURN ON FORECLOSURE.

I, W. E. Hale, sheriff of the county of Alameda, do hereby certify, that by virtue and in pursuance of the annexed order of sale and decree of foreclosure and sale, I advertised the property described as follows, to wit:

All those certain lands, situate, lying and being in the county of Alameda, State of California, bounded and described as follows, to wit:

Commencing at a stake marked 'H,' at high-water mark of the Bay of San Francisco, on the south side of the willows of Temescal, at the northwest corner of land formerly owned by John A. Hobart, being Plot No. Six (6) on a certain map of the Ranchos of Vincente and Domingo Peralta, as surveyed by Julius Kellersberger, now on file in the recorder's office of Alameda county, and running thence along the northerly line of said Plot No. 6 north 72¼° east 34.40 chains to a post in the northern fence of said Hobart's lot, said post being the southeasterly corner of Plot No. 39 on said map; thence north 28¼° west 31.61 chains along the easterly line of Plots 39 and 7 of said map to the northeast corner of Plot No. 7; thence south 78¾° west 1

chain; thence north 13° west 2.68 chains to the south line of Plot No. 41 on said map; thence along the south line of said Plot No. 41 south 75½° west 26.05 chains to a stake or post on the beach near where the old slaughter-house formerly stood, said stake or post bears from the northeasterly corner of the house formerly occupied by Louis G. Bruguiere, north 36° west, and is 32 rods distant therefrom. Said stake is also the northwesterly corner of Plot No. 7 on said map; thence in a southeasterly direction along the shore of the Bay of San Francisco 30.97 chains to a stake at the southwesterly corner of said Plot No. 7; thence south 62° east 7.50 chains to the point of beginning, containing 115 acres, more or less, and being the same three tracts conveyed by John McHenry and Ellen McHenry, his wife, to William Y. Patch, by deed recorded in the county recorder's office of Alameda county, in liber 'G' of deeds, pages 700 and 701. Together with all and singular the tenants, hereditaments and appurtenances thereunto belonging or in anywise appertaining, to be sold by me in front of the court-house door, in the city of Oakland, county of Alameda, on the 25th day of January, A. D. 1886, at ten o'clock A. M.; that previous to said sale I posted written notice particularly describing the property for twenty days, in three public places of the township or city where the property is situated, and where the property was to be sold, and also caused due and legal written notice thereof to be published once a week for the same period preceding said sale in the *Oakland Daily Evening Tribune*, a daily newspaper published in the county of Alameda, and that on Monday, the 25th day of January, 1886, the day on which said premises were so advertised to be sold as aforesaid, I attended, at the time and place fixed for said sale, and exposed the said premises for sale in one (1) parcel at public auction, according to law, to the highest bidder for cash, in gold coin of the United States, when James Mee, being the highest bidder therefor, the said premises were struck off by me to the said James Mee for the sum of eighty-four thousand six hundred and eleven and 76-100 dollars in United States gold coin, which was the whole price bid, and which I acknowledge to have received, and that I delivered to said

purchaser a certificate of said sale, and filed a duplicate thereof in the office of the county recorder of the said Alameda county.

And I further certify that I deducted from the said sum of	$84,611 76
My fees, commissions, and expenses, amounting to the sum of	1,726 68
Leaving a net balance of	$82,885 16

Which net balance I have paid to plaintiff's attorneys, whose receipt therefor is hereunto attached.

I further certify that the proceeds of said sale are insufficient to make the payments, or any part thereof, decreed herein to be due to said defendant, Laura E. French; and I herewith return that there is a deficiency on said decree and judgment due to said defendant, Laura E. French, from defendant, Edward Wiard, of $8,063.46; and I herewith return said order of sale and decree wholly unsatisfied as to the judgment due to said defendant, Laura E. French, and fully satisfied as to the judgment due to plaintiff, Moses Hopkins, without further service.

Dated at Oakland, this 27th day of January, 1886.

W. E. HALE,
Sheriff of the County of Alameda.
By W. S. HARLOW,
Under Sheriff."

The following is a copy of the receipt given to the sheriff by plaintiff's attorneys:

$82,885.16. OAKLAND, *January* 25, 1886.

Received of W. E. Hale, sheriff of Alameda county, eighty-two thousand eight hundred and eighty-five and 16-100 dollars in United States gold coin, being the amount of judgment, interest, costs, &c., due plaintiff, Moses Hopkins, in the case of *Moses Hopkins* v. *Edward Wiard et als.* (No. 3414), superior court, county of Alameda.

JARBOE, HARRISON & GOODFELLOW,
Plaintiff's Attorneys."

That thereafter, to wit, March 22, 1886, the defendant, Edward Wiard, having died, T. L. Barker, executor of the last will and testament of Edward Wiard, deceased, was substituted as defendant in place of said Wiard by an order of said court on that day made and entered, in the words and figures following, to wit:

"[Title of court and cause.—No. 3414.]

In this action it being made to appear that the defendant, E. Wiard, has died since the making of a motion in his behalf to set aside the sale of the property under the decree herein, and that Timothy L. Barker has been duly appointed his executor.

It is now, on motion of J. H. Smith, Esq., ordered that the said Timothy L. Barker, as executor, be substituted as defendant in the place of said E. Wiard, and that all proceedings hereafter be in the name of said Barker, as such executor.

Thereupon, upon motion of C. M. Jennings, Esq., attorney for defendant, Laura E. French, it is ordered that the motion herein on her behalf to set aside said sale, &c., be dismissed without prejudice.

And, upon motion of J. H. Smith, Esq., it is further ordered that the said motion heretofore made on behalf of said E. Wiard be, and the same is, dismissed without prejudice.

W. E. GREENE,
Judge."

That thereafter, to wit, on the 8th day of June, 1886, the defendant, Laura E. French, gave to the plaintiff in said action, and to James Mee, the purchaser at said sale, and to said W. E. Hale, sheriff of said Alameda county, a notice of her intention to move to set aside the aforesaid sale, of which notice the following is a copy:

"[Title of court and cause.]

You will please take notice that Laura E. French, one of the defendants in the above-entitled action, will move the court, on Monday, the 21st day of June, 1886, in department No. 3 thereof, at its court-room, in the court-house of said Alameda county, in the city of Oakland, at the hour of

ten o'clock A. M. of that day, or as soon thereafter as counsel can be heard, to set aside the sale made by the sheriff of said county of the real estate of said defendant, Edward Wiard, mentioned and described in plaintiff's complaint, under the decree of foreclosure of mortgage and order of sale issued thereon, made and rendered in the above-entitled action, upon the grounds and for the reasons:

1. That said decree and order of sale issued thereon were and are, and each of them is, erroneous and void, in that said decree and order of sale provided that said sheriff should sell said real estate as a whole, in one entire tract, and not in separate parcels and lots, as the same had been previously separated, known, and described.

2. That said real estate was first offered for sale and sold at said sale by said sheriff against the protest of this defendant and of said defendant Edward Wiard, as a whole and in one entire tract, and not in separate parcels and lots, as the same had been previously separated, known, and described.

3. That an agreement was entered into before said sale was had, and before said decree was entered and filed, between said plaintiff, by his attorneys, and one James Mee, whereby plaintiff, through his said attorneys, was to cause said premises to be sold as a whole, in one lump or body, and not in separate lots or parcels; and the said James Mee, in consideration thereof, agreed to bid the amount of plaintiff's mortgage, interest, and costs, and no more, for said property—the same being sold as a whole and in one body.

That pursuant to said agreement there was embodied in said decree, at the instance of plaintiff, by his said attorneys, a provision requiring said property to be sold in one lump or body, and said attorneys did at said sale direct and require said sheriff to, and he did thereupon, sell said property in one lump or body, as a whole and not in parcels, and said James Mee did thereupon bid and offer the amount of plaintiff's said mortgage, interest, and costs, and no more, for said property so sold in one lump or body, and the same was struck off to him therefor.

Said motion will be made, based, and heard upon the af-

fidavits heretofore served upon you, filed and now of record in this cause, and upon the affidavits filed and served upon you upon like motion herewith by T. L. Barker, Esq., executor of defendant Edward Wiard, late deceased, and upon the oral testimony of witnesses to be produced and sworn upon the hearing hereof, and upon the papers, files, and records in said action, and each of them.

C. M. JENNINGS,
Att'y for Def't Laura E. French.

To Messrs. Jarboe, Harrison & Goodfellow, Attorneys for Moses Hopkins, plaintiff, and to James Mee, Esq., purchaser, and W. E. Hale, Esq., Sheriff of said Alameda county."

And that thereafter, to wit, on the 21st day of June, 1886, the said motion came on to be heard before the court, Mr. C. M. Jennings appearing in behalf of said motion for said Laura E. French, and Messrs. Jarboe, Harrison & Goodfellow appearing in opposition thereto in behalf of the plaintiff, Moses Hopkins, Mr. Joseph Mee appearing in opposition thereto in behalf of Mr. James Mee, the purchaser at said sale, and Messrs. Jarboe, Harrison & Goodfellow, and Joseph Mee, Esq., appearing in opposition thereto in behalf of W. E. Hale, Sheriff of said Alameda county.

At the hearing of said motion there was read before the court the aforesaid complaint in said action and the aforesaid answer of the defendant Laura E. French, and the aforesaid judgment rendered therein, with the memorandum thereon, on the outside thereof, as follows:

"This decree satisfactory.
November 30, 1885.

J. H. SMITH,
Attorney for E. Wiard."

(NOTE.—Remainder of bill of exceptions consists of affidavits in support of motion).

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA.
Filed April 25, 1887.

Moses Hopkins, Appellant,
v.
Edward Wiard *et al.*, Respondents. } *No.* 11,850.

Mr. Justice Sharpstein delivered the opinion of the court.

This is an appeal from an order setting aside a sale made by virtue of a judgment and order of sale in an action to foreclose a mortgage executed by the defendant to the plaintiff.

There is nothing in the record which tends in any degree to impeach the fairness of the sale; and it appears that the purchaser paid to the sheriff the sum bid for the premises, and that the sheriff paid it to the plaintiff.

Respondents' counsel says that the "decree is satisfied of record; its authority is dead, it is not now a lien upon said premises." This is claimed to result from the sale which has been set aside. The plaintiff was entitled to have the incumbered property sold. The court was authorized to direct a sale of it. (C. C. P., 726).

The judgment contains a direction "that the said lands and premises be sold as a whole and in one parcel." The premises were so offered for sale and sold as a whole and in one parcel, although the sheriff was requested by respondents to sell in separate parcels.

The principal contention of the respondents is that "the order inadvertently made by the court in the decree, directing that the premises be sold in one parcel, was erroneous and void, and no act of the sheriff in selling or otherwise could legalize the same; and although the sheriff may have followed such (supposed) directions, the same, nevertheless, being illegal, because founded on an illegal decree, will be set aside, and in this case was properly set aside upon motion."

There is nothing in the record to indicate that the court *inadvertently* decreed "that the premises be sold in one

parcel." It does appear that the decree was shown to the defendant's attorney, before it was signed by the judge, and that said attorney wrote upon the margin of it: "This decree is satisfactory," and signed the same as the attorney of E. Wiard, defendant. It further appears that the decree was so submitted to defendant's counsel by direction of the judge. If the defendant's attorney did not carefully examine the several clauses of the decree before indorsing on it his satisfaction, the fault was his own, as it appears from his own affidavit that he was given an opportunity to examine it and was told that the judge desired he should.

The main contention of respondents is that the court exceeded its jurisdiction in ordering that the premises be sold as a whole and in one parcel. The code provides that, 'in such action the court may by its judgment direct the sale of the incumbered property;" but is silent as to the mode of sale. The provisions of the code in this respect are not materially different from those of the late practice act. And in Heymann *v.* Babcock, (30 Cal., 367), the court said: "No express provision is found in the practice act providing the mode of making sale of the mortgaged premises under a decree of foreclosure." In the absence of any provision prescribing the mode, we think the court might under its power to direct the sale, direct how it should be made. Such appears to have been the opinion of Justice Sanderson, who, in a concurring opinion in Heymann *v.* Babcock, *supra*, said: "If the judgment contains specific directions, they must be followed by the officer." In Babcock *v.* Perry, (8 Wis., 277), the court reversed an order similar to that now before us. One of the grounds upon which it was contended that the order setting aside the sale was not erroneous was that "The premises were sold together, and not in parcels." In answer to that the court said: "It is to be observed that the sheriff as well as the party was bound to pursue the order of the court in making the sale, and that order was that the premises should be sold together." In Langsdale *v.* Mills, 32 Black (Ind.), 380, the court said: "The question is not what the decree ought to have been, but what it is. While it remains in its present form any sale made under it, not authorized by its terms, cannot stand."

It is within the jurisdiction of the court to direct by its judgment that the property should be sold in one or several parcels, and the officer making the sale was bound to follow the directions contained in the judgment. The judgment was not void, and if erroneous, its terms could not be disregarded by the officer charged with the execution of it. But it has not been shown to be even erroneous. Whether it was or not depends upon the facts before the court when the decree was made. Before signing the decree the court directed that it be submitted to defendant's attorney, and it was so submitted to him, and he indorsed on it that it was satisfactory. The decree was what both parties agreed it should be, and, as was said in Smith v. Southwell (6 Cal., 47): "To set aside the sale on this ground under the circumstances would be to allow a party to take advantage of his own deceit or negligence." The sale of the premises in gross was occasioned by the direction in the decree that it should be so sold. And the court had evidence before it that the decree was satisfactory to both the mortgagor and the mortgagee. As was said in Cord v. Southwell (15 Wis., 211): "There is no error apparent on the face of the judgment. It was not necessary, in order to justify the directions as to the manner of selling the mortgaged premises, that a foundation should be laid in the pleadings. The court might make them upon facts shown at the hearing, or by consent of parties."

We fail to discover any sufficient ground for setting aside the sale. In Morris v. Bishop of Durham (1 Ves. Jr., 57), Lord Eldon said: "The only case in which biddings should be reopened was when there was some fraud or misconduct in the purchaser, or fraudulent negligence in another person, of which it would be against conscience that the purchaser should take advantage."

The rule undoubtedly is to consider every fair sale as final.

"Upon an application for a resale the rights of the purchaser will be taken into account and will prevail when the sale has been fair and free from fraud, or other circumstances which give it an undoubted right to have it set aside." (2 Jones on Mortgages, Sec. 1673).

Order appealed from reversed.
We concur:
McFARLAND, J.,
PATERSON, J.

CONCURRING OPINION.

I concur in the judgment. The portion of the judgment of the court below, directing the property mortgaged to be sold as one tract, is not void. The court had power to render such judgment. The sheriff made the sale in one tract in conformity with the judgment which, or the material parts thereof, the writ must have recited. (C. C. P., Sec. 684). The court in setting aside the sale, made no change in the judgment. The motion to set aside the sale was made on the ground that the property was sold as one tract. As the judgment remains unchanged, the process which issues to the sheriff, compelling him to sell, must follow the judgment, and the sale must be made of the property as one tract as it was before. The sale must be in conformity with the judgment, under a writ reciting the judgment, or the material parts thereof. (C. C. P., Sec. 684). As long as the judgment remains as it is, I am of opinion the sale must stand, and therefore concur in the reversal of the order.

THORNTON, J.

PETITION FOR WRIT.

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA.

MOSES HOPKINS, Plaintiff and Appellant, *v.* LAURA E. FRENCH, Defendant and Respondent.	Nos. 11,850 and 11,851.

To the Honorable the Supreme Court of the State of California:

Laura E. French, by this her petition, shows:

That she is and during all the times hereinafter was a resident of the State of Oregon.

That she is defendant and respondent in the above-entitled cause; that Moses Hopkins, plaintiff and appellant, and Jame Mee, appellant herein, were at all the times hereinafter mentioned, and each of them now is, resident of the State of California.

That on, to wit, the 18th day of August, 1885, in the superior court of Alameda county, in a certain cause therein pending between petitioner as plaintiff and one Edward Wiard, defendant, petitioner recovered judgment against said Wiard for the sum of eight thousand five hundred fifty-seven and 50-100 dollars ($8,557.50), which was thereafter, to wit, then and there duly entered and docketed in said court, execution issued thereon, and duly returned partially satisfied only; that there is a balance of eight thousand dollars ($8,000.00) and upwards still due her, and unpaid thereon.

That after recovery of said judgment by this petitioner, plaintiff and appellant, Moses Hopkins, exhibited his complaint in said superior court against said Edward Wiard, praying the foreclosure of a certain mortgage executed by said Wiard upon said tracts of land in said Alameda county, and that said land be sold in the manner provided by law for the sale of real propeaty upon execution, &c. That the said lands and premises covered by said mortgage at the time of its execution and continuously hitherto consisted of six separate and distinct tracts separately marked and bounded, and three of which marked by separate, different, and distinct user, and were at all times so and notoriously known and known to said plaintiff and the sheriff of said county of Alameda, and to said James Mee, appellant; that thereafter judgment by default was taken against said defendant, Edward Wiard, and decree thereon entered directing the sale of said lands and premises *en masse*, and the same and the same were thereafter so sold by the sheriff of said county against the instructions and protest of said Edward Wiard and of this petitioner, his judgment creditor.

That thereafter said superior court, upon motion duly made, argued, and submitted by this petitioner, set aside said sale; that from and against said order said plaintiff and appellant, Moses Hopkins, and one James Mee, claim-

ing to be a purchaser of said property at said sheriff's sale, took separate appeals to this honorable court; that thereafter this honorable court, being the highest court of law and equity of said State in which decision could be had and in which final judgment or decree could be rendered, made and entered its judgment against this petitioner on each of said appeals, which said judgment, and each of them, became and were final on the 25th day of June, A. D. 1887, wherein and whereby manifest error was committed, to the great damage of this petitioner and her rights, that is to say:

1. The said decree, in so far as it directs the sale of said lands and premises *en masse*, or a default judgment, no allegation or prayer therefor being made, was and is void *pro tanto*, and in violation of section 1 of Article XIV of the Amendments of the Constitution of the United States, in that it denies to all persons, and to this petitioner in particular, the equal protection of the laws of said State.

2. Petitioner's judgment being a contract, &c., gave her a right to redeem any of the separate parcels of said lands and premises of and from the operation of any prior lien, any statute or decision whereby that right is denied or invaded, impairs the obligations of said contract, and is in violation of section X of Article I of the Constitution of the United States, and to that extent is void.

3. The decision herein is in violation of section 1 of Article XIV of Amendments of the Constitution of the United States, in that it denies to all persons, and to this petitioner in particular, the equal protection of the laws of said State.

Wherefore petitioner prays for the allowance of a writ of error, and such other process as may cause the same to be corrected by the Supreme Court of the United States; and, for the purposes of such writ, the said appeals of Moses Hopkins, plaintiff and appellant, and of said James Mee, appellant, be consolidated.

And will ever pray, &c.

C. M. JENNINGS,
Attorney for Petitioner.

STATE OF CALIFORNIA, } ss:
City and County of San Francisco, }

C. M. Jennings, being first duly sworn, deposes and says that he has read the foregoing petition, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters and things therein set forth upon information or belief, or which are matters of professional judgment, and as to those matters on information and belief or judgment he believes it to be true.

Affiant further says he is an attorney at law by profession, and at all times hereinbefore named was and is the attorney and counsel of petitioner, Laura E. French, in the matter of Laura E. French, plaintiff, against Edward Wiard, defendant, in the superior court of Alameda county, referred to in the foregoing petition, and in the matter of Moses Hopkins against said Edward Wiard and others in said superior court, and in the matter of the appeals from which this writ was prosecuted, and as such attorney is as well or better acquainted with the facts set forth in said petition as said Laura E. French, petitioner, is herself.

Further, that said Laura E. French is a non-resident of the State of California, and is absent from said State, and at present in the State of Massachusetts, as this affiant is informed and believes, her home and residence being in the State of Oregon, and for these reasons affiant makes this verification for and on her behalf.

C. M. JENNINGS.

Subscribed and sworn to before me this 14th day of July, A. D. 1887.

[SEAL.] HOLLAND SMITH,
Notary Public.

[Endorsed:] Filed July 15, 1887. J. D. Spencer, clerk, by J. S. Williams, deputy.

ORDER OF CONSOLIDATION.

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA.

MOSES HOPKINS, Plaintiff and Appellant,
v.
EDWARD WIARD *et al.*, Defendants and Respondents. } *No.* 11,851.

APPEAL BY MOSES HOPKINS FROM ORDER MADE ON MOTION OF DEFENDANT, LAURA E. FRENCH.

MOSES HOPKINS, Plaintiff,
v.
EDWARD WIARD *et al.*, Defendants and Respondents. } *No.* 11,850.

APPEAL BY JAMES MEE, PURCHASER, FROM ORDER MADE ON MOTION OF LAURA E. FRENCH.

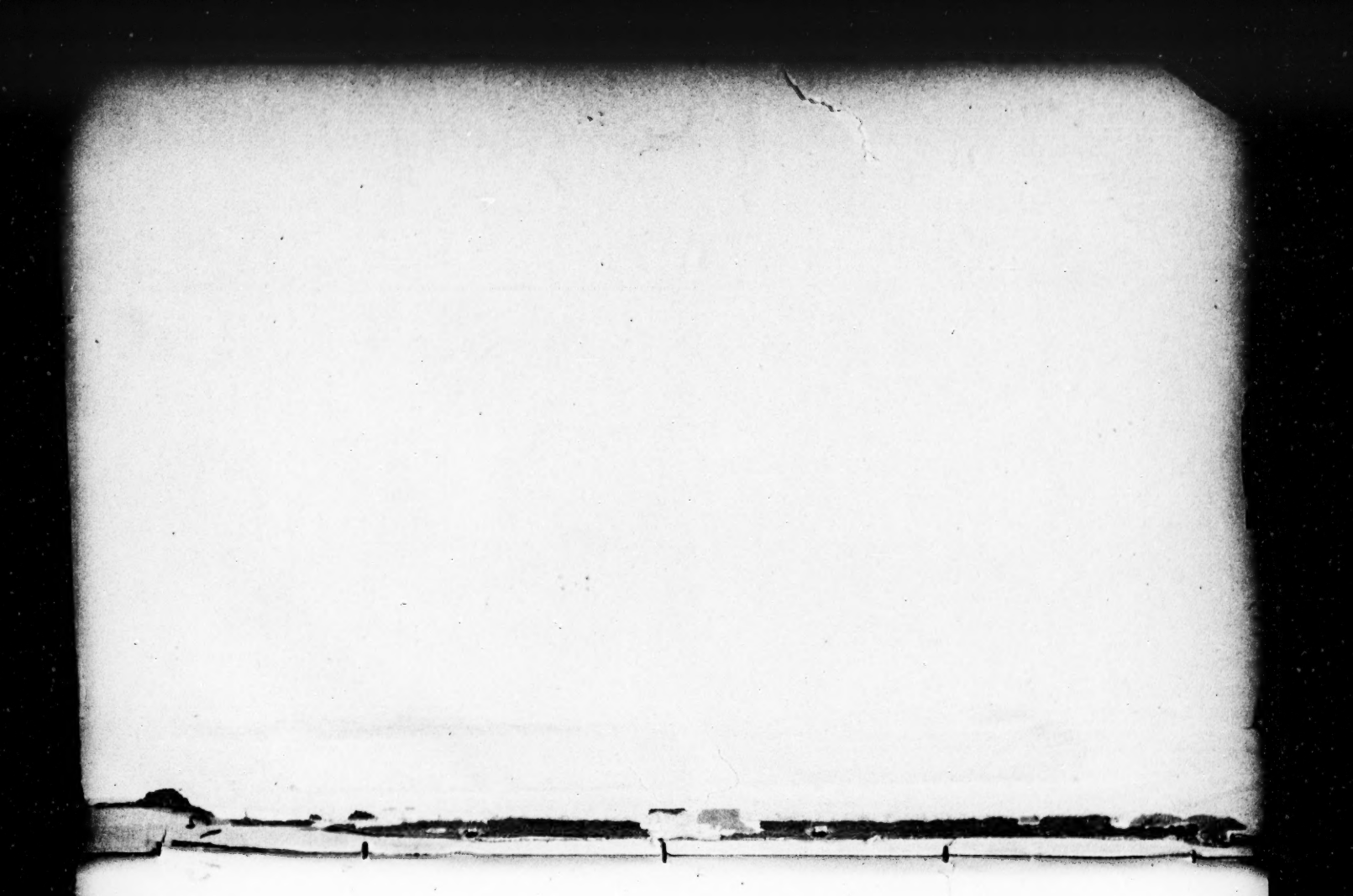
Respondent Laura E. French having filed her petition praying that she be allowed a writ of error to the Supreme Court of the United States from the judgment heretofore entered up in the above entitled causes, and each of them, and also that for the purpose of such writ of error the said causes be consolidated, and it appearing to the court that the records in said appeal by Moses Hopkins and said appeal by James Mee are indentical, and good cause being shown therefor, it is now on motion of C. M. Jennings, counsel for said respondent, Laura E. French—

Ordered, That the said cases, being Nos. 11,850 and 11,851, be and the same are for the purposes of such writ of error hereby consolidated. But such consolidation shall not prevent either said Moses Hopkins or said James Mee from separately taking such action in the matter of said writ of error as he may be advised, without prejudice to the other.

Dated this 15th day of July, A. D. 1887.

NILES SEARLES,
Chief Justice Supreme Court
of State of California.

[Endorsed:] Filed July 15, 1887. J. D. Spencer, Clerk, by J. S. Williams, Deputy.



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124-534

IN THE

Supreme Court of the United States.

No. 1108.

LAURA E. FRENCH,

PLAINTIFF IN ERROR.

vs.

MOSES HOPKINS and JAMES MEE,

DEFENDANTS IN ERROR.

Brief of Plaintiff in Error—Reply to Defendants in Error on Motion to Dismiss.

J. W. DOUGLASS,
Attorney for Plaintiff in Error.

C. M. JENNINGS,
Of Counsel.

IN THE

Supreme Court of the United States.

LAURA E. FRENCH,
PLAINTIFF IN ERROR,
v.
MOSES HOPKINS AND JAMES MEE,
DEFENDANTS IN ERROR.

No. 1,108.

Brief of Plaintiff in Error, in Reply to Defendants in Error, on Motion to Dismiss.

STATEMENT OF THE CASE.

Plaintiff in error is now and at all times mentioned was a citizen and actual resident of the State of Oregon. All other parties to said cause were and are likewise citizens and residents of the State of California.

Plaintiff in error obtained judgment for upwards of $8,500, against E. Wiard, in the Superior Court of Alameda County, State of California. Subsequently defendant in error, Moses Hopkins, exhibited his bill against E. Wiard, in same Court, praying decree of foreclosure of mortgage. Plaintiff in error filed a cross complaint therein, against her co-defendant, Wiard. The latter made *default*, and decree of foreclosure was granted directing sale of mortgaged premises by the

Sheriff of the county, "in the manner prescribed by law for the sale of real property under execution," and that they "be sold as a whole and in one parcel," and which was so divided and separated at the time of execution of mortgage, which fact was known to all parties, including the Sheriff. The attorney for defendant, E. Wiard, endorsed the following memorandum on the outside of the decree before it was signed or entered. "This decree is satisfactory, J. H. Smith, attorney for E. Wiard," but denies he ever consented to said decree. (*Vide* his affidavit, record, appendix hereto, page 16.) The decree was not submitted to this plaintiff in error or her counsel, and neither knew of the provision directing a sale *en masse* until the morning of the sale. The Sheriff sold the premises to defendant in error, James Mee, as one parcel against the protest of the judgment debtor, E. Wiard, and plaintiff in error, Laura E. French. The latter made a motion in said Superior Court to set aside said sale on the grounds:

1. That it was made *en masse*, and not in separate parcels.

2. Fraud and collusion between defendants in error, Hopkins and Mee, whereby the property, consisting of six separate and distinct parcels, was sold *en masse* for the precise amount of Hopkins' mortgage claim, all competition in bidding being thereby cut off. (*Vide* appendix to defendants' brief, page 27, paragraph 3, *et seq.*)

The Court made an order setting aside said sale without specifying upon which, or restricting the order to either of the grounds alleged. (*Vide*, order, appendix defendant's brief, page 7.) Aside from the mortgage premises defendant, mortgagor was wholly insolvent.

Defendants in error each took separate appeals from said order to the Supreme Court of the State, and that Tribunal reversed the order of the lower court, from which decision this writ of error is sued out. The record in each of said cases being identical, except names, the same were, by order of the Chief Justice of the State, for the purpose of this writ, consolidated.

The above facts appear from the appendix to defend-

ants' brief, being part of the record, and further printed extracts therefrom attached hereto entitled appendix.

ERRORS ASSIGNED.

Jurisdiction of this Honorable Court is claimed on the grounds:

1. That the present is a controversy wholly between citizens and residents of different States.

a. Plaintiff in error, being a citizen and resident of a different State from defendants in error, embraces this, the first opportunity, to remove her cause to a Federal Court.

2. The decision of the Supreme Court of the State of California is in conflict with, and violation of, Section 1. Article XIV of the Amendments to the Federal Constitution, in that it divests plaintiff in error of property without the due process of law, and denies to all persons, and her in particular, the "equal protection of the laws" of said State secured and guaranteed by said Section of the Federal Constitution.

3. The judgment of plaintiff in error, being a contract, embodied, as an essential part thereof, the right and privilege to redeem any one or more of the separate parcels of land in controversy, of and from the operation of any prior lien, any decision whereby that right is denied or invaded impairs the obligation of said contract, and is in violation of Section 10 of Article I, of the Constitution of the United States, and to that extent void.

ARGUMENT.

It is not necessary to confer jurisdiction here that the record should show *in ipsissimi verbis* that a Federal question was presented, or that the particular clause in the National Constitution alleged to be violated should be set out or referred to in the pleadings.

Murdock v. *City of Memphis*, 20 Wall. 590.
Furman v. *Nickol*, 8 Wall. 44.
Murray v. *Charleston*, 96 U. S. 432.

It is sufficient

1. If the controversy is wholly between citizens and residents of different States.

2. If the decision below necessarily raises the question whether a law of the State conflicts with the Federal Constitution.

3. If the decision of the Court below denies to and deprives the party of substantial rights or privileges secured to him by the Constitution of the United States, and it is enough if the record involves a substantial controversy on this point without reference to the ultimate decision of this Court upon the rights or privileges of the parties respectively as presented in the writ of error.

Arrowsmith v. *Harmoning*, 118 U. S. 194.
University v. *People*, 99 U. S. 309.
The Binghampton Bridge, 3 Wall. 51.
Starin v. *N. Y.*, 115 U. S. 257.
Chicago Life Ins. Co. v. *Needles*, 113 U. S. 574.
Southern Pacific Co. v. *State Cal.*, 118 U. S. 109.

Plaintiff in error, Laura E. French was party defendant with E. Wiard, judgment debtor, and George M. Palmer, administrator, etc., in the suit to foreclose mortgage. The decree awarded therein, recognized her cross-complaint as against her co-defendant Wiard, and her position as antagonistic to his, but by reason of her being a party defendant with him and his being a citizen and resident of same State as defendants in error here, she was precluded from then removing said cause to a Federal Court. The present proceeding, however, is an independent one. The controversy is solely between citizens and residents of different States. She is here, and for the first time wholly disconnected and absolved from all privity, interest, and connection with her former co-defendants, Wiard and Palmer, and is exclusive plaintiff in error and party in interest therein, and for that reason, joined to the fact of her citizenship and residence in the State of Oregon, and the citizenship and residence of defendants in error in the State of California, she is entitled to have this

Writ of Error heard, and the errors therein suggested corrected by this Honorable Court.

Vide. Sec. 2, Article III Constitution U. S., Act Congress, March 3, 1875, and amendments thereto—Act of Congress, March 3, 1887, Chap. 373, Vol. 24 U. S. Statutes at Large, page 552.

Section I of Article XIV of Amendments to the Federal Constitution provides:

"* * * No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction equal protection of the laws."

We submit the two latter paragraphs should be construed together. That "due process of law" is not and cannot be had "without the equal protection of the law."

It occurs to us the only rational interpretation that can be given to the latter paragraph is: The laws of a state shall be interpreted and observed alike to all persons. There shall be no discrimination in favor of or as against any person. The rights, privileges and immunities accorded to one are thereby secured to each and all under "substantially similar circumstances and conditions." And when the decision of the highest court, or court of last resort, in a State, is subversive of this principle; when the plainest provisions of that law, previously and in similar cases sanctioned and upheld, are now, in a given and single case, ignored, in consequence of which plaintiff in error is denied (we would not transgress the truth if we said robbed) of valuable and substantial rights and privileges, and wholly deprived of the means of enforcing a lawful contract, to-wit, a judgment of a Court of Record, we submit, there is a palpable denial of that "equal protection," secured to her by the aforesaid Amendment, and the "due process of law" therein mentioned is wanting; the Amendment is violated and a question properly cognizable in this Honorable Court arises.

Defendant in error, Moses Hopkins, obtained decree

of foreclosure by default of judgment debtor, E. Wiard, (*vide* his brief, pages 17 and 18). His complaint alleged no necessity, nor made any demand for sale of mortgaged premises *en masse*. (*Vide* said brief, pages 7 to 12 inclusive.)

Section 580 of the Code of Civil Procedure of the State of California is as follows:

"The relief granted to plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint, but in any other case the Court may grant him any relief consistent with the case made by the complaint *and embraced within the issue.*" (Italics ours.)

This Section has been heretofore judicially interpreted to mean what it says, and litigants have uniformly received the protection it affords. *Vide.*

Raun v. *Reynolds*, 11 Cal. Rep. 19.
Reynolds v. *Harris*, 14 Id. 678–9.
Gage v. *Rogers*, 20 Id. 91.
Lampwing v. *Hyatt*, 27 Id. 102.
Gautier v. *English*, 29 Id. 165.
Parrott v. *Den*, 34 Id. 81.
Lothian v. *Wood*, 55 Id. 159.
Simon v. *Blake*, 12 Abbt. Pr. 331.
Ames v. *Lockwood*, 13 How. Pr. 555.
Mevey's Appeal, 4 Pa. St. 83.
Wolcott v. *Schenck*, 23 How. Pr. 385.

Section 694, same Code, being the only section that prescribes the manner of making sales of real property, that we are aware of, is as follows:

"All sales of real property under execution must be made at auction to the highest bidder, etc. * * After sufficient property has been sold to satisfy the execution, no more can be sold * * * When the sale is of real property, consisting of several known lots or parcels, they must be sold separately; or when a portion of such property is claimed by a third person, and he requires it to be sold separately, such portion must be so sold.

"The judgment debtor, if present at the sale, may also direct the order in which property, real or personal, shall be sold * * * ."

Section 701, same code, provides,

"Property * * or any part sold separately, may be redeemed by—* * (Subdivision 2) a creditor having a lien by judgment or mortgage on the property sold, or on some share or part thereof, subsequent to that on which the property was sold * *—Section 702—at any time within six months after the sale."

The foregoing sections have been uniformly sanctioned as the law of the land. That a motion to set aside was proper process to cure any irregularities of sale,

San Francisco v. *Pixley*, 21 Cal. rep. 57.
Bowles v. *Johnson*, 23 Id. 226.
Vigouereux v. *Murphy*, 51 Id. 346.
Brown v. *Ferrea*, 51 Id. 552.

and held to apply to sales under decree of foreclosure,

Kent v. *Laffam*, 2 Cal. rep. 596-7.
Harlan v. *Smith*, 6 Id. 175.
Gross v. *Fowler*, 21 Id. 396.
Stout v. *Macy*, 22 Id. 650.

with the single exception of the case at bar, wherein they have been wholly ignored.

The claim of defendant in error, Hopkins, amounting to $84,611.76, was unusually large. The mortgage premises sold consisting of six separate and distinct parcels at the time of the execution of the mortgage and continuously up to and at the time of decree and sale, was sold *en masse*. The right to redeem any one or more of these parcels singly was a valuable and substantial right and privilege, and gave to plaintiff in error a specific interest, property and estate therein, and was the only practicable means of enforcing her judgment.

The affirmance of said sale, as made *en masse*, was a denial of that right and privilege—a confiscation of property rights, and was, we submit, a denial to her of the due process of law, and that "equal protection of the law," secured by Section 1, Article XIV, of Amendments to the Federal Constitution, *Supra*. Hence, jurisdiction is conferred upon and it is the

right and duty of this Honorable Court to entertain, hear and determine this Writ.

San Bernardino Co. v. *S. P. R.*, 118 U. S. 422–3.

Concurring opinion of Mr. Justice Field, the learned Judge says:

"The great constitutional amendment (the XIV) which insures to every person, whatever his position or association, the equal protection of the laws, necessarily implies, freedom from the imposition of unequal burdens under the same conditions."

In *Barbier* v. *Connolly*, 113 U. S. 27–31, the same learned Judge who pronounced the decision of the Court says:

"The Fourteenth Amendment, in declaring 'that no state shall deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended that there should be no arbitrary spoliation of life, or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances, in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the Courts of the country for the protection of their persons and property, and prevention and redress of wrongs, and the enforcement of contracts; * * * that no greater burdens should be laid upon one than are laid upon others in the same calling and condition."

Plaintiff in Error had a judgment. A judgment is a contract. (2 Bl. Com. 465.) The means of enforcement a part of its obligation; the law of the land a part thereof; the State a party thereto, in so far that no act of the State, or any of its officers or servants, Legislative, Executive or Judicial, can operate to impair the obligation of that contract. One of the essential and valuable attributes of her contract, and the only means of its enforcement, was the right and privilege of redeeming any one or more of the separate parcels of the property of the judgment debtor. Wiard, from the mortgage lien of Hopkins. *Vide*, Sec. 701, Code of Civil Procedure,

supra, and cases there cited. Any decision or act which in effect denies or invades that right is, we submit, in violation of Sec. 10 of Article I of the Federal Constitution. The judicial interpretation of a law is as much a part of a law as if written therein.

Lehigh Water Works v. *Easton*, 121 U. S. 388.
Walker v. *Whitehead*, 16 Wall. 314–317.
Brown v. *Kinzie*, 1 How. 311–317.
McCraken v. *Hayward*, 2 Id. 608–612, 613.
Antoni v. *Greenhow*, 107 U. S. 769–774.

The case of *Railroad Co.* v. *Rock* (4 Wall 177) cited by counsel, aside from the fact that there is an inaccuracy in its quotation is, we submit, not parallel with the case at bar. There this Court declined jurisdiction whose only purpose would have been to construe the terms of a contract made between citizens of the same State Here the controversy is between citizens of different States, and the impairment of the obligation complained of is the willful ignoring of a statute (and numerous authorities sanctioning its letter and spirit) so plain in terms that "he who runs may read," thereby depriving plaintiff in error of valuable and substantial rights, to-wit, the means, and the only means, of enforcing her contract.

Counsel's suggestion "that the writ of error was sued out for delay" is mildly amusing, as defendant Hopkins had received his money, and defendant Mee was in possession of the land before the writ was sued out.

The decree of foreclosure was rendered on the default of the mortgagor; no allegation of necessity or prayer for sale *en masse* was made in the complaint. Section 580, Code of Civil procedure cited, *supra*, prohibiting greater relief on default judgments than demanded in the complaint, and the decisions in pursuance thereof, *Raun* v. *Reynolds*, 11 Cal. 19, and other cases cited on page 6 of this brief, the Supreme Court of California, in rendering its decision, could not reconcile or dispose of by argument; it therefore—wisely (?) ignored them.

The cases of *Heyman* v. *Babcock*, 30 Cal. 367, and

Babcock v. *Perry*, 8 Wis. 277, which it cites to justify itself for the conclusion it was about to announce, were *not judgments by default*, but upon answer and contest made, and for aught that appears, the complaints demanded the particular judgment awarded.

Counsel is in error in saying, "It is admitted that the sale was in strict pursuance of the judgment of the Court below," on the contrary the same is expressly denied.

The decree of sale directed the property to be sold "in the manner prescribed by law for the sale of real property under execution." Section 694, Code of Civil Procedure, *cited supra*, prescribes the mode of sale "on Execution," and directs a sale in separate parcels. The decree further adds, "and that the said lands and premises be sold as a whole and in one parcel." Here is a contradiction in the decree as to the mode of sale: One clause directs the lands and premises be sold in separate and distinct parcels; the other *en masse*,—which? even if we grant the latter to be a lawful exercise of authority. The aforesaid Court found it convenient to ignore the former direction wholly. It further says "there is nothing in the record that tends to impeach the fairness of the sale," (Mortgagee Hopkins and purchaser Mee, defendants in error are accused of fraud and collusion. (*Vide* page 27 of defendants' brief.

Onesti v. *Freelon*, 61 Cal. rep. 625.
Allschul v. *Doyle*, 48 Id. 535.
Hubbard v. *Sullivan*, 18 Id. 525.
Clark v. *Huber*, 25 Id. 589.)

All the defendants in the Court below were present at and protested against the sale being made *en masse*,—were "surprised at the desire to so sell." (*Vide.* record, affidavits of E. Wiard, J. H. Smith, his attorney, C. M. Jennings, attorney for defendant Laura E. French, in appendix hereto, pages 13 *et seq.*) But notwithstanding these protests, etc., and the equivocal directions for sale in the decree, Messrs. Hopkins and Mee demanded that the sale proceed and be made *en masse*. (It is not pretended, but that defendants in error, the

Sheriff and all parties, were familiar with the lands and premises, and of their actual division at the time of execution of mortgage, and continuously up to and at time of sale into six separate and distinct parcels. Yet the Court say "there is nothing that tends to impeach the fairness of the sale." We submit without comment, whether the weight and authority of judicial conscience would not conclude otherwise.

The attorney for E. Wiard endorsed on the margin of the decree, "This decree is satisfactory," and signed his name as "Attorney for E. Wiard."

The positions of E. Wiard and this plaintiff in error were directly antagonistic. She had filed and been allowed a cross-complaint and judgment thereon as against him. His attorney did not represent her, and did not claim to, and his acts could not bind her in any way whatsoever, she being represented solely by other counsel, Mr. Jennings. Yet the Supreme Court, ~~in the exuberance of its desire to render a decision that would meet the approval of Messrs. millionaire Hopkins and Moe, defendants in error~~, cite this endorsement as the act of plaintiff in error, and by their decision decree that she suffer therefor, and their Counsel "catches up" the echo in his argument (see page 4 of his brief) when he says: "The judgment (in the Court below) was satisfactory to the attorney for defendant in the foreclosure proceedings." The inference would be that he refers to plaintiff in error, who was one of the defendants, but such statement is a grave error, and directly contradictory of the record. Supposing defendant, E. Wiard, by his attorney, did signify his satisfaction with the decree, his admission would not bind this plaintiff in error, between whom there is no privity, but antagonism of interests. Then how and why is it cited against her?

The recital (see pages 30 and 31 of defendants' brief) that "defendant's attorney examined, or might have examined, the decree, and on page following, "The decree was what both parties agreed it should be," so far as it relates to this plaintiff (who was one of defendants below) is a grave mistake of fact, flatly contradicted by the record, and a piece of inexcusable

negligence on the part of the Court, for which my client is made to suffer.

If this writ of error is to be dismissed it will simply result in the confiscation, by defendants in error, of the judgment of plaintiff in error, now amounting to over $10,000, it being fully shown by the record that the property, sold *en masse*, and under the manipulation of defendants in error, for upwards of $100,000 less than its actual value. (*Vide* extracts from record, affidavits of E. Wiard and J. S. Emery, printed in appendix, hereto, pages 13, 24).

Upon the grounds and for the reasons:

1. That it is a controversy wholly between citizens of different states.

2. The decision of the Supreme Court of the State of California abridges and deprives plaintiff in error, of, (*a*) rights and privileges common to all citizens (*i. e.* the right as a judgment, lien, or to redeem any one or more of the parcels of the property of the judgment debtor from the operation of any prior lien); (b) deprives her of property without due process of law, and (*c*) denies her 'that equal protection of the laws,' guaranteed to all persons within the jurisdiction of said state. (Section 1, Article XIV, Amendments to Federal Constitution.)

3. The decision of the Supreme Court of California, ignoring the statute, (Sec. 580 C. C. P. *supra*) cut off the only means of enforcing a contract of record, impaired its obligation (Sec. X, Art. 1, Federal Constitution)

We submit the motion to dismiss should be overruled and this writ of error heard and determined on its merits by this Honorable Court.

Respectfully,

J. W. DOUGLASS,
Attorney for Plaintiff in Error,
Laura E. French.

The limited time, less than two days, Counsel has been able to devote to the preparation of this brief he has been suffering from severe indisposition, and therefore

begs indulgence for any crudity of expression, etc., that may appear.

C. M. JENNINGS,
Of Counsel for Plaintiff in Error.

APPENDIX.

The following are extracts from the record on Writ of Error to the Supreme Court of the United States, pertinent to the question of jurisdiction in addition to those embraced in "APPENDIX" subjoined to brief of defendants in error, and consist of:

1. Affidavit of E. Wiard.
2. Affidavits (2) of J. H. Smith.
3. Affidavits (2) of C. M. Jennings.
4. Affidavit of J. S. Emery.

AFFIDAVIT OF E. WIARD.

"[Title of Court and Cause.]

STATE OF CALIFORNIA, County of Alameda, } ss.

E. Wiard being duly sworn, says: I am a defendant in the above entitled action. That the plaintiff therein, Moses Hopkins, brought said action to foreclose a mortgage given to him by me to secure the payment of a note of $70,000, dated March 2, 1883.

That a decree of foreclosure was entered in said Court in October, 1885, and that the Sheriff of said county, under said decree, advertised and sold the land covered by said mortgage on the 26th day of January, 1886, and that one James Mee, Esq., was the purchaser thereof at said Sheriff's sale for the sum of $84,611.76, being the amount of the judgment and costs in said decree. That the land so mortgaged and sold by the Sheriff aforesaid consisted of two separate

pieces or parcels of land, one not contiguous to the other, being separated and divided by land not owned by me and which I sold some eight or ten years ago. That one of said pieces or parcels of land is situate west of the railroad running from West Oakland to the town of Berkeley in Alameda County aforesaid, and is known as 'Shell Mound Park,' containing about ten acres of land, upon which are erected large buildings, etc. That the other of said pieces or parcels of land is situate in Oakland Township, County of Alameda aforesaid, and is known as the 'Oakland Trotting Park,' containing about ninety-eight acres of land, upon which are erected large buildings, etc. That the Sheriff at said sale sold the said two pieces or parcels of land as a whole, and as one piece or parcel. That I never, in any wise, consented to having the same sold by the Sheriff as one piece or parcel. That I was not present at the day of sale on account of being in feeble health, and was unable for that reason to attend the sale, but that J. H. Smith, at my request, attended said sale for me, and was instructed by me to request the Sheriff to sell the said land in separate parcels, and not as a whole. That the market value of said land and property at the time of said sale was largely in excess of the said sum for which it was sold by the Sheriff, and that had it been sold in separate tracts would have brought a great deal more than the said sum of $84,611.76, and that the market value of said property largely exceeds the sum of $100,000, and that the said ten acres known as 'Shell Mound Park' will alone sell for more than $25,000.

E. WIARD.

Subscribed and sworn to before me, this 3d day of February, 1886.

C. C. JENKS,
Justice of the Peace."

AFFIDAVIT OF J. H. SMITH.

"[Title of Court and Cause.]

STATE OF CALIFORNIA,
County of Alameda. } ss.

J. H. Smith, being duly sworn, says: I was present at the sale of the real estate of E. Wiard, sold by the Sheriff of Alameda County, on the 25th day of January, 1886, under a decree of foreclosure of mortgage in the case of *Moses Hopkins* v. *E. Wiard, et als.*, Superior Court of Alameda County, California. That said property was sold by the Sheriff as a whole, and was purchased by James Mee, Esq., at said sale, for the sum of $84,611.76, being the amount of the judgment and costs in said action.

That I am acquainted with the location of said property. That the same consists of two distinct and separate tracts of land, separated and divided by a tract of land conveyed by said E. Wiard to C. Crocker, by deed dated A. D. 1876, and recorded in the Recorder's office of said Alameda County, in Deed Book No. 122, page 171, in said year. That one of said tracts of land is situated west of the railroad running from the City of Oakland to the town of West Berkeley, in said Alameda County, containing about ten acres, and is known as and includes Shell Mound Park. That the other tract is situate east of said railroad, and contains about ninety-eight acres of land, and includes what is known as the 'Oakland Trotting Park.'

That Shell Mound Park is inclosed with a high board fence, and has large buildings and other improvements thereon, and is now and has been for a long time leased for and used as a pleasure ground for picnics, etc. That the other said tract has large buildings, etc., and other improvements thereon, and has been and now is used for a race-track, fair grounds, etc., and sixty-five acres thereof is inclosed in a high board fence.

That I attended said Sheriff's sale on behalf of said defendant, E. Wiard, and as his attorney, and before the sale, and at the time thereof I requested the

Sheriff, in behalf of said E. Wiard, to sell said land in two separate parcels, viz.: one tract known as Shell Mound Park, as aforesaid, and the other as the Trotting Park aforesaid. That I then and there informed the said Sheriff, the purchaser, James Mee, Esq., and the attorney for said plaintiff, that said real estate consisted of two separate parcels of land, divided by said railroad and divided by a tract of land not owned by said E. Wiard. That one was known as Shell Mound Park, and contained about ten acres of land; and that the other said tract was situate east of said railroad, and was known as the Oakland Trotting Park, and demanded, in the name of said E. Wiard, that they should be sold separately, and not as a whole; but the Sheriff refused to sell them separately, and sold them as a whole.

That there was, to my own knowledge, a bidder present to bid on said Shell Mound Park, had the same been sold separately.

J. H. SMITH.

Subscribed and sworn to before me, this 4th day of February, 1886.

C. C. JENKS,
Justice of the Peace of the City of Oakland."

AFFIDAVIT OF J. H. SMITH.

"[Title of Court and Cause.]

STATE OF CALIFORNIA, County of Alameda. } ss.

J. H. Smith, being duly sworn, says: That the decree of foreclosure in the above case was handed to him by one of the attorneys for plaintiff before the same was signed by the Judge, with the remark that the Judge wished the affiant to see it before he signed it, and for affiant to indicate thereon in writing that it was satisfactory, remarking also that he wished to take the decree with him to have it signed and filed. That affiant was busy at the time, several clients being in his office, but he took the decree, and while the said attorney stood in front of his desk, made a calculation as to

the principal, interest and attorney's fees therein, so as to see that the same were correct, after doing which he commenced to turn over the pages of the draft of the decree and examine the other parts thereof, when said attorney made the remark to him that the decree was in the usual form, or that it was the usual decree, whereupon affiant, without any further examination, being satisfied from said remarks, wrote upon the margin of said draft or decree, 'This decree is satisfactory,' and signed the same as attorney for E. Wiard. That he did not know at the time and was not informed of the provision therein directing the property mentioned therein to be sold as a whole, and that had he been so informed, or had he known the fact, would not have so signed it, and was not so informed by the plaintiff's attorneys until the time for the sale of the said property; and that said Edward Wiard did not know of said provision in said decree until after said sale.

J. H. SMITH.

Subscribed and sworn to before me, this 20th day of May, 1886.

E. NUSBAUMER,
Justice of the Peace of Oakland Tp., Al. Co., Cal."

AFFIDAVIT OF C. M. JENNINGS.

"[Title of Court and Cause.]

STATE OF CALIFORNIA, City and County of San Francisco. } ss.

C. M. Jennings, being first duly sworn, on oath deposes and says:

That he is the attorney for Laura E. French, one of the defendants in the above entitled action. That said Laura E. French recovered a judgment in said Superior Court of Alameda County against the defendant Edward Wiard, on or about the 18th day of August, 1885, for the sum of eight thousand five hundred and eight and 60-100 dollars. That thereafter, to-wit: on the day last aforesaid, said judgment was duly and regularly docketed in the office of the County Clerk of said Alameda County, and execution issued thereon to

the Sheriff of said county, who thereafter, to-wit: on or about September 28th, 1885, returned the same partially satisfied only

That thereafter, to-wit: on or about the 10th day of February, 1886, said Edward Wiard died at said County of Alameda, leaving a last will and testament, in and by which one T. L. Barker was nominated and appointed executor. That said will has been admitted to probate by this Court after due proceeding had therein. That said T. L. Barker has accepted the said trust, qualified thereunder, and entered upon the discharge of its duties, and thereby became, and was and is the duly qualified and acting executor under said will.

That there still remains a balance of seven thousand eight hundred and ten and 26-100 dollars, and interest due and unpaid said Laura E. French upon her said judgment, which said claim and balance has been duly presented, allowed, approved and filed in this Court in the matter of the estate of said Edward Wiard, deceased.

That the death of said Edward Wiard has been suggested in this cause, and his said executor substituted, etc.

That affiant attended the sale made by the Sheriff of said Alameda County under the decree of foreclosure and sale issued thereon in this cause on the 25th day of January, 1886, as the attorney for said Laura E. French, and then and there, on her behalf, objected to and protested against the sale of the lands and premises of the said defendant Edward Wiard, to-wit: the lands and premises in said mortgage and complaint mentioned and described, being made as a whole and in one lot or parcel, and then and there demanded of said Sheriff that the same be first offered for sale and be sold in separate lots and parcels by him, according to law; but the said Sheriff, though well advised of the rights and interests of this defendant therein, disregarding the objections and protests of this affiant made on her behalf, and the protest and objections of said defendant Edward Wiard, by his attorney, James H. Smith, Esq., then and there present, and made by, upon the advice of, and at the instance and request of

John R. Jarboe, Esq., attorney for said plaintiff Moses Hopkins, refused to offer said lands and premises for sale in separate lots or parcels, or to sell the same in separate lots or parcels, but, in compliance with the request of said plaintiff's attorney, thence proceeded to, and did offer for sale and sell the lands and premises aforesaid, consisting of, as affiant is informed and believes, notoriously known and recognized as three separate and distinct pieces, parcels, or tracts of land, commonly called and designated as 'Shell Mound Park,' 'The Oakland Trotting Park,' and the 'Wiard Homestead' respectively, as a whole, and in one body or tract.

Affiant further says that he is advised and believes that said lands and premises so as aforesaid sold in one parcel or body are marked and platted on the official map of said Oakland Township, otherwise known as Kellersberger's map of Vincente and Domingo Peralta Rancho, to which reference is made in said decree of foreclosure and sale, in three separate and distinct plots or divisions, the same being known, called, and described thereon as plots '7,' '39,' and triangular plot between said plot '7,' and plot '41,' as laid down on said map, containing 4 81-100 acres of land.

Affiant further says that he is advised and believes that the lands and premises aforesaid consist of, and are and were at the time of said sale and for a long period prior thereto, actually divided into six separate and distinct lots or divisions, each distinctly and actually segregated, marked, bounded, and identified from the other, recognized as such, susceptive of description, available and in condition to be sold separately in distinct lots or parcels, instead of as a whole and in one body.

And affiant specifies such separate and distinct parcels or tracts of land as follows:

1. The tract on the easterly side of said premises, separately fenced, bounded and inclosed, fitted up, and adapted, and used as a race or turf course, known as and called 'The Oakland Trotting Park.'

2. The tract of land immediately west of the last named tract, and east of the railway track, and right of

way of the 'Northern Railway Company'—commonly known as the 'Central Pacific Railroad'—running from West Oakland, in said Alameda County, to the town of East Berkeley, in said county, separately bounded and enclosed, known as and called the 'Wiard Homestead.'

3. The triangular tract of land between the railroad tracks of said Northern Railway Company, diverging at Shell Mound Station on said premises; thence running to the towns of East Berkeley and West Berkeley respectively, separately bounded and inclosed thereby.

4. The tract of land west of the westerly line of said railway, and north of the tract and inclosure known as and called 'Shell Mound Park,' being separately bounded and inclosed; on the north by lands owned by the Pacific Coast Manufacturing and Transportation Company, on the south by said Shell Mound Park, on the east by the westerly line of said railway, and on the west by the Bay of San Francisco, used for pasturage.

5. The tract and enclosure west of the westerly line of said railway, and south of said last named tract separately bounded and inclosed, known as and called 'Shell Mound Park,' used as and for recreation grounds and social gatherings, etc.

6. The tract west of said west line of railway and south of said 'Shell Mound Park,' separately bounded and enclosed, on the north by said 'Shell Mound Park,' on the south by lands owned by the California Iron Manufacturing Company of San Francisco, on the east by the track and right of way of said Northern Railway Company, on the west by the Bay of San Francisco.

Said six separate tracts, plots, pieces or parcels of land being further shown, marked, platted and represented and numbered in their numerical order respectively on the following diagram:

Affiant further says that he has good reason to believe, and does believe, that said plaintiff and said Sheriff and also said purchaser at said sale, James Mee, Esq., each well knew at the time of said sale that said lands and premises consisted of said several lots or parcels as aforesaid, and that the plots marked on said diagram as '2,' '3' and '5,' in addition to the dividing fences and other circumstances of demarkation, were entirely separated and divided from each other by lands deeded to, held and owned by persons outside of, and strangers to this record at the time of said sale, and continuously for a long time prior to the execution of the mortgage mentioned and referred to in plaintiff's complaint. That said plaintiff, by his attorneys, after the order for said decree had been obtained, consolidated said three separate and distinct parcels of land, as set forth in said mortgage and complaint, into one description and embodied the same into said decree and order of sale and the publication thereof privately, and without right and against the wish and interest of this defendant.

Affiant further says that he visited said sale with the intention of bidding upon said property should the same be sold in separate and distinct parcels, and that he purposed and intended to bid the sum of twenty-five thousand dollars for the tracts west of the railway running from West Oakland to the town of West Berkeley, containing about ten acres, and that he advised said Sheriff of his intention to bid thereon before said sale began.

That affiant now has a *bona fide* offer of One thousand dollars per acre for the tract marked '4' on said diagram.

Affiant further says that said property was sold by said Sheriff for the sum of eighty-four thousand six hundred and eleven dollars and seventy-six cents ($84, 611.76), which sum affiant is advised and believes is far below its actual commercial value; that a sum largely in excess of said amount would have been bid for said property if the same had been sold in separate parcels and not as a whole; that in consequence of said property being sold in one body, said defendant

Laura E. French, as a judgment creditor of said Wiard, is precluded from redeeming any of the separate parcels of said land, as she could of right have done had the same been sold separately. That she has thereby suffered great damage by reason of said sale having been made in the manner and form aforesaid, to-wit: the loss and damage of five thousand dollars and upwards.

Wherefore, affiant prays that said sale may be set aside.

That said defendant Laura E. French may have such further order and relief in the premises as may be just and proper.

C. M. JENNINGS.

Subscribed and sworn to before me, this 26th day of May, 1886.

E. H. THARP,
Notary Public."

[Seal]

AFFIDAVIT OF C. M. JENNINGS.

"[Title of Court and Cause.]

STATE OF CALIFORNIA,
City and County of San Francisco. } ss.

C. M. Jennings, being first duly sworn, in addition to the statements set forth in his affidavit heretofore served and filed in the matter of the motion to set aside the Sheriff sale in the above entitled cause, and for a like purpose therewith, deposes and says, on oath:

That said defendant Edward Wiard, late deceased, was, at the time of his death, for more than a year prior thereto, has been, and his estate now is, wholly insolvent.

That at the time of the order for the decree of foreclosure in said cause was obtained, in a conversation with John R. Jarboe, Esq., one of plaintiff's counsel, said Jarboe told this affiant that he would prepare said decree, and asked this affiant to furnish him with the amount of unpaid balance due the defendant Laura E. French on her said judgment against defendant

Edward Wiard, that he might provide that any surplus arising at said sale might be applied towards the payment and discharge of her said unpaid balance of judgment, in compliance with said order.

In a previous conversation said Jarboe gave affiant to understand that he intended to provide by the terms of the decree that the surplus arising on said sale, if any, should be paid into Court, whereupon affiant requested that the decree be drawn so as to direct the payment of said surplus to his client, and not into Court and the said Jarboe agreed thereto, and afterwards told affiant that he had drawn the decree in that form. That affiant did furnish the amount and balance due and unpaid defendant, Laura E. French, on her said judgment against defendant Wiard to said Jarboe; that said draft of said decree was not submitted, shown or exhibited to this affiant, at or before its final entry and filing, and this affiant was not advised and did not know its contents prior to said sale, and affiant, relying upon the said statements of said Jarboe did not examine or read the said decree until after said sale.

That affiant did not know, nor was it intimated to him in any manner, that said decree provided for the sale of said real estate in one body or lump, or that a sale in such manner was desired by plaintiff or his attorneys; on the contrary, affiant understood and believed, up to the time said property was offered for sale by said Sheriff, that said sale would be made in separate parcels, and discussed the propriety of bidding upon separate parcels with his client, and had purposed and intended to bid thereon, and especially upon the said tract known as 'Shell Mound Park,' as stated in previous affidavit served and filed, which said tract does not contain, as affiant is informed and believes, to exceed ten acres.

C. M. JENNINGS.

Subscribed and sworn to before me, this 15th day of June, A. D. 1886.

E. H. THARP,
Notary Public."

[Seal]

AFFIDAVIT OF J. S. EMERY.

"[Title of Court and Cause.]

STATE OF CALIFORNIA, } ss.
City and County of San Francisco. }

J. S. Emery, being first duly sworn, deposes and says: That he is over twenty-one years of age, and is now and for over twenty-seven years has been, a resident of Oakland Township in said Alameda County. That during said time he has been continuously engaged in buying, selling and dealing in real estate, town lots and acre property in said township, and is now and during all such time has been familiar with the market values thereof.

That he is now, and for the past twenty-seven years has been, familiar with the tract of land in said Oakland Township commonly known as the 'Wiard Tract,' embracing and also generally known as 'Shell Mound Park,' the 'Oakland Trotting Park' and the 'Wiard Homestead,' in all about one hundred and ten acres. Affiant now lives upon and owns and for over twenty-seven years last past has lived upon and owned the tract containing upwards of 125 acres immediately adjoining said Wiard Tract on the south, and affiant is now, and during all said period has been, familiar with the market value of said Wiard Tract. And affiant affirms that said tract is now, and upon the 25th of January last was, worth and of the market value of one hundred and fifty thousand dollars ($150,000) and upwards, in gold coin of the United States.

That affiant is now, and for more than three years last past has been, selling small parcels from his own said tract, which same are of a like general character with said Wiard Tract, at the rate of four thousand dollars per acre and upwards in open market. And affiant is of opinion, and knows no reason why said Wiard Tract, if so divided into smaller parcels and thus offered for sale, would not be worth substantially the same value in the open market.

Affiant further says he has no interest in the above entitled cause or any circumstance that may arise or grow out of it so far as affiant is now advised.

J. S. EMERY.

Subscribed and sworn to before me, }
this 15th day of June, 1886. }

GEORGE T. KNOX.
[SEAL] Notary Public."